No. 14397.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MOTORES DE MEXICALI, S. A., a corporation,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, *et al.*,

Appellee.

BRIEF OF APPELLEE, BANK OF AMERICA, N. T. & S. A.

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Statement of the Case.

On March 6, 1953, and April 2, 1953, Appellant sold five automobiles to the Bankrupt, a California corporation [R. 148; Finding 9, R. 63]. Physical possession of the cars was delivered in Mexico to the Bankrupt's representative, together with bills of sale and the Mexican title documents pertaining thereto [R. 148, 132-133; Finding 9, R. 63-64]. The Bankrupt's agent drew non-negotiable drafts on the Bankrupt for the purchase prices of the cars, and delivered the drafts to the Appellant in exchange for possession of the vehicles, the bills of sale, and the title documents [Crs. Ex. A, B, C, D and E; [R. 132-133; Finding 9, R. 64]. The drafts were made payable *through* the Bank, and expressly provided that

they were to be forwarded "for collection only." The Bankrupt had promised the Appellant three or four months before [R. 140] that the drafts would be paid upon presentment, but the Bank had no knowledge of this promise [Finding 13, R. 66, 140]. The Appellant knew and understood at the time of delivery of the cars and the title documents that the Bankrupt planned to register the vehicles in California and "floor" them with a bank, and Appellant's manager delivered the title documents for the express purpose of putting the Bankrupt in a position to place a lien on the vehicles and to obtain loans on the security thereof [R. 140, 144; Findings 10, 11, R. 64-65].

The Bankrupt brought the cars to California, obtained California title documents, and borrowed money from Appellee Bank on the strength of trust receipts describing the cars. The California title documents were delivered to the Bank before the advances were made, and the Bank was shown as the "legal owner" thereon [Ex. 4, 5, 6 and 7; Findings 2, 3, 4 and 5; R. 60-62; Finding 11, R. 64-65]. The Bank advanced money in good faith in reliance upon the trust receipts, the California ownership certificates and the possession of the cars by the Bankrupt [Finding 11, R. 64-65].

The drafts, in the form of envelopes, either empty or containing blank pieces of paper, were forwarded by the Appellant through banking channels to the Appellee Bank for collection [R. 65-66]. The March drafts [Ex. A and B] were dishonored by the Bankrupt, returned to Appellant's Bank and resubmitted by Appellant's Bank, before the April drafts [Ex. C, D and E] were issued [Finding 12, R. 65-66]. All of the drafts were in the collection department of the Bank unpaid at the time the advances

were made by the Bank to the bankrupt, but the lending officer of the Bank had no knowledge of their existence until after the advances were made [Findings 16 and 17, R. 67-68].

The five disputed vehicles, or their proceeds, came into the hands of the Trustee [Findings 2, 3, 4 and 5, R. 60-62]. On July 29, 1953, the Bank filed its petition to reclaim the vehicles or their proceeds to the extent necessary to satisfy the debt owing from the Bankrupt to the Bank [R. 7-12]. Appellant filed its cross-petition also asserting title to the proceeds and the matter was duly heard and determined in favor of Appellee [R. 70-71]. The Referee's opinion appears at R. 37-52. The order of the Referee was affirmed by order of the District Court on April 29, 1954 [R. 88-89] in which order the District Court adopted the findings and conclusions of the Referee [R. 89]. From this order, Motores de Mexicali appealed. The Trustee did not appeal.

Questions Presented.

1. Whether the Trial Court was correct in concluding that Appellant is estopped to claim the vehicles because it delivered to the Bankrupt possession of the cars and indicia of ownership thereto for the express purpose of permitting the Bankrupt to issue trust receipts placing a lien thereon.

2. Whether the Trial Court was correct in concluding that the presence of the unpaid drafts in the collection department of the Bank at the time the advances were made did not place the Bank upon notice that Appellant claimed a right to the vehicles or their proceeds superior to the lien of the trust receipts issued by the Bankrupt to the Bank.

3. Whether the Trial Court was correct in granting the Bank's motion to strike as irrelevant conversations between the Bankrupt and Appellant which were not heard by or communicated to any representative of the Bank.

Summary of Argument.

1A. The Appellant, by delivering possession of the vehicles and indicia of ownership to the Bankrupt, is estopped to claim any title superior to the lien of the Bank.

B. There are no facts giving rise to an estoppel against the assertion of the Bank's lien.

C. The conversations between the Bankrupt and the Appellant were irrelevant as to the Bank and were properly stricken.

2. The fact that as between themselves the Appellant and the Bankrupt may have intended to make sales of the vehicles for cash does not give the Appellant a right to retain title as against the Bank. The cases cited by the Appellant are distinguishable.

3. The promises allegedly made by the Bankrupt to the Appellant that the drafts would be paid upon presentment and the representation allegedly made by the Bankrupt to the Appellant that the March drafts had been taken care of did not put the Bank on notice of any fraud and in any event such promises and representations did not bind the Bank.

4. The challenged findings are adequately supported by the evidence.

ARGUMENT.

I.

A. The Appellant, by Delivering Possession of the Vehicles and Indicia of Ownership to the Bankrupt, is Estopped to Claim Any Title Superior to the Lien of the Bank.

It is a long established equitable maxim that "where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer." California Civil Code, Section 3543. The California courts have held this maxim applicable to a situation where the owner of property transfers possession to another and gives the other indicia of ownership as was done in this case. *Fowles v. National Bank of California,* 167 Cal. 653, 140 Pac. 271 (1914); *Powers v. Pacific Diesel Engine Co.,* 206 Cal. 334, 274 Pac. 512 (1929); *Peoples Finance etc. Co. v. Bowman,* 58 Cal. App. 2d 729, 137 P. 2d 729 (1943). In the *Bowman* case, *supra,* the court said (p. 736):

> After reading the cases, and giving consideration to their *rationale,* we are convinced that, where an owner deposits his property with another and gives the depository such *indicia* of ownership that a reasonable man dealing with such agent is reasonably led to believe the agent is the owner of such property and parts with value in reliance thereon, the third person will be protected even though the true owner is guilty of no more than misplaced confidence. Such misplaced confidence must be held to be negligence within the meaning of the maxim above-referred to. (See also, *Bank of America v. National Funding Corp.,* 45 Cal. App. 2d 320 [114 P. 2d 149].)
>
> In the instant case defendant certainly must be found to have misplaced its confidence in Bowman

> and that plaintiff suffered loss thereby. As misplaced confidence amounts to negligence under the facts here, we must hold that the case comes within the language of section 3543 of the Civil Code and that defendant and not plaintiff must suffer the loss caused by the action of Bowman.

It is clear from the testimony that the Appellant delivered the title documents on the vehicles to the Bankrupt for the express purpose, known to the Appellant, of permitting the bankrupt to "floor the cars with the Bank" [R. 144, Finding 10, R. 64]. From the testimony it is also plain that the understanding between the Appellant and the Bankrupt was that the Bankrupt would give trust receipts to the Bank covering the vehicles. The Appellant clearly intended that the Bank was to rely upon the possession by the Bankrupt of the indicia of ownership and the vehicles. The Bank took trust receipts on the vehicles [Exhibits 4 to 7 inclusive] and advanced moneys to the Bankrupt on the basis of the trust receipts and the California ownership certificates obtained by the Bankrupt by the use of the title documents given to the Bankrupt by the appellant. [Findings 2, 3, 4, 5 and 11; R. 60-62, 64-65; 109-116; 132-133].

In the instant case, as in the *Bowman* case, *supra,* the Appellant deposited the property with the Bankrupt and gave the Bankrupt such indicia of ownership that a reasonable person in the Bank's position dealing with the Bankrupt would be led to believe that the Bankrupt was the owner of the property. The language of the court in the *Bowman* case is applicable to this situation and "the third person will be protected even though the true owner is guilty of no more than misplaced confidence." The general manager of the Appellant tacitly admitted that he

placed confidence in the Bankrupt and that the confidence was misplaced [R. 145]. His testimony brings the case squarely within the rule announced in the *Bowman* case, *supra,* and the conclusion is inescapable that the Appellant is estopped from claiming title to the vehicles or their proceeds superior to the lien of the Bank.

Even assuming for purposes of argument that the Seller-Appellant had expressly retained title to the vehicles until the price was paid (which it did not do), it has been held that the seller is estopped as against a third party to claim title. In *Plummer v. Kingsley,* 190 Ore. 378, 226 P. 2d 297 (1951), the court said (226 P. 2d 303):

> We limit our decision to the facts of the instant case in which the owner expressly retained title until cash payment should be made but in which he did deliver to the fraudulent purchaser both the car and the certificate of title. We hold that when an owner voluntarily clothes the fraudulent or criminal purchaser with the indicia of title and delivers to him the possession of the chattel, he will be estopped to assert his title as against one who for value and in good faith and without notice purchases the chattel in reliance upon the apparent ownership of the one so entrusted with possession and indicia of title.

To the same effect is *Wren v. Bankers Investment Co.* 207 Okla. 339, 249 P. 2d 712 (1952).

It is to be noted that in the instant case the trial court found that all of the elements of estoppel: representation, reliance, detriment, and lack of notice to the Bank, were present [Finding 10, 11, 14, 15 and 16; R. 64-67]. The Referee also specifically found in Finding 14 [R. 66-67] that the Appellant was negligent in that it failed to retain possession of the Mexican registration papers and the

bills of sale until the drafts were honored and in that it failed to attach to or enclose the aforesaid papers with the drafts but instead delivered the indicia of ownership direct to the Bankrupt, thus placing the Bankrupt in a position to encumber the vehicles.

B. There Are No Facts Giving Rise to an Estoppel Against the Assertion of the Bank's Lien.

Appellant argues in Point 3 of his brief (App. Op. Br. 21-30) that the Bank was somehow under a duty to Appellant to pay the drafts out of the proceeds of the loans and that therefore Section 3543 of the Civil Code does not apply.

In the first place, the drafts which form the basis for the claim of the Appellant [Exhibits A, B, C, D and E] were not drafts drawn upon the Bank but were drafts drawn upon the Bankrupt payable *through* the Wilshire-La Brea Branch of the Bank. The drafts specifically directed the *Bankrupt* to pay to the Appellant the sums specified "upon presentation of this draft to the Bank designated below FOR COLLECTION TOGETHER WITH the documents properly executed indicated on the reserve [*sic.*] hereof." It is to be noted that the drafts in two places in capital letters indicated that they were to be forwarded for collection and collection only, and that the drafts did not contain the words "order" or "bearer" which are prerequisites to negotiability under Section 3082(4) of the California Civil Code.

Counsel seeks to charge the Bank with a duty to pay the drafts, and this contention is grounded upon the simple fact that the drafts were present in the collection department of the Bank at the time the advances were made by the Loan Department of the Bank.

In the first place the function of a bank in handling a collection is strictly that of an agent rendering a service to the forewarding party by presenting the collection item to the obligor, collecting the money if possible, and remitting the proceeds of the collection, when and if received, in accordance with the instructions of the forwarding party. The collecting bank ordinarily has no financial interest in the collection or the proceeds, other than a small collection fee, and it had none in this case. The only concern of the Bank with the drafts here involved was to collect the money, if possible, from the drawee (the Bankrupt) and remit it, if collected, to the Appellant's forwarding Bank.

When the nature of the collection function is understood it becomes clear that the presence of the unpaid drafts in the collection cage of the Bank would not charge the lending department of the Bank with knowledge of their contents. *A fortiori,* their presence in the collection cage gives no notice that the vehicles were unpaid for, or that the Bankrupt's title was defective, or that the Bankrupt had defrauded the Appellant.

In *Hartford v. All Night and Day Bank,* 170 Cal. 538, 540 it was held that it was not the duty of a commercial teller to investigate to determine whether or not a savings account was maintained. The court placed the duty upon the customer to see to it that the Bank was properly advised of the customer's desires. So also in the instant case if Appellant desired the Bank to correlate the lending function with the collection function for its benefit, Appellant should have so directed or requested. This it did not do.

The mere presence in the collection cage of the unpaid drafts does not charge the lending department of the Bank

with knowledge of the contents of the drafts. It would be unreasonable to charge a bank with notice of the ramifications of the myriads of detailed transactions processed each day in the various departments. *State v. Brown County Bank,* 112 Neb. 642, 200 N. W. 866; *Globe Indemnity v. Union Planters' Bank and Trust Company,* 27 F. 2d 496 (C. C. A. 6, 1928). In the instant case the only evidence with respect to the presence of the drafts in the Bank on the dates of the transactions consists in the collection date stamps on the backs of the drafts themselves. The Appellant produced no evidence (and none exists) tending to show that the presence of the drafts was brought to the attention of anyone other than the clerks in the collection cage. It is clear from the testimony and from the findings, on the other hand, that the items were not brought to the attention of the lending officers who handled these loans [Finding 17, R. 68; 116]. Under these circumstances we can see no duty upon the lending officers to divert loan proceeds to the payment of the drafts.

It is fundamental that there can be no actionable negligence in the absence of a duty on the part of the Bank to the appellant. Counsel does not make clear the theory on which he concludes that the Bank was under any duty toward his client to pay the drafts. Even if the Bank had been designated drawee of the drafts there would be no liability imposed upon the Bank to pay them. Civil Code, Sec. 3208. The fact that the drafts were made payable through the Bank was merely a means of designating a convenient place for presentation to Bi-Rite Auto Sales, the drawee.

The appellant argues at considerable length that the presence of the unpaid drafts in the Collection Department

of the Wilshire-La Brea Branch placed the Bank on notice either that the vehicles had been fraudulently obtained by the Bankrupt from the Appellant or that title had been retained by the Appellant until payment of the drafts. In this connection it is to be noted that the drafts [Exhibits A, B, C, D and E] were in the form of envelopes and the writing on the drafts indicated that the reason they were so designed was to provide a convenient means of transmitting the title documents pertaining to the vehicles being sold. It is significant, however, that the Appellant did not use the drafts for this purpose but delivered the title documents to the Bank apart from the drafts, and that two of the draft envelopes [Exhibits A and B] contained blank sheets of paper and three of them [Exhibits C, D and E] were completely empty [R. 133-134]. Appellant therefore chose not to use the drafts for the purpose for which they were designed; yet counsel now insists the Bank should have pretended that they were so used, and is to be charged with negligence for not so pretending.

The forwarding of the drafts through the Bank for collection is entirely consistent with the theory that the vehicles were sold on credit, the credit having been extended by the seller until the drafts shall have been paid. It is significant that the Appellant in many cases granted extensions of time for the payment of drafts [R. 136]. When the draft envelope as a whole is considered together with the fact that it contained either blank pieces of paper or nothing at all, it becomes clear that the existence of the drafts themselves does not compel an inference of either a cash sale or that there was any intent on the part of the parties to retain title to the vehicles until the drafts should be paid, or that any fraud was involved.

The act of the Appellant in delivering the title documents and the fact that the bankrupt had in his possession the California registration certificates were sufficient to rebut any inference of a cash sale or an intent to retain title insofar as the Bank is concerned.

Appellant contends that the presence of the unpaid drafts in the Bank apparently put the Bank on notice of a defect in title to the cars. In this connection it is to be noted that the trial court found in Findings 16 and 17 that the Bank officer in charge of making the advances had no actual knowledge that the drafts given by the Bankrupt to the Appellant were unpaid at the time the advances were made. This finding is supported by the testimony of Mr. Fort [R. 116, 125-126]. The last advance was actually made on May 19, the date of the last trust receipt [R. 120] and the court found that this advance was made prior to the existence of any knowledge of any unpaid drafts on the part of the Bank officers [Findings 16 and 17; R. 67-68]. The fact that the credit was not placed on the ledger of the Bankrupt until May 21 resulted from normal delay in posting and does not mitigate against the fact that the trust receipts and the title documents were delivered to the Bank and the loan commitment made on May 19, 1953.

We do not quarrel with the general propositions set forth in Appendix 3 of the Appellant's Brief to the effect that the actual knowledge of a bank officer is chargeable to the bank and that the knowledge of an agent in general is imputed to the principal. We submit, however, that there has been no showing in this case of any knowledge, actual or constructive, chargeable to the Bank of any intent on the part of the Appellant to retain title to the vehicles.

On the contrary, all of the acts of the Appellant in the transaction were designed to induce the Bank to extend credit on the faith of the title documents and the possession of the vehicles by the Bankrupt.

Counsel contends in Point 3 of his Brief (Br. 21-30 and Appendix 3) that the Bank is chargeable with notice of the Appellant's alleged right as an unpaid seller to reclaim title to the vehicles because the drafts were payable through the Bank, presented at the Bank, and were present in the collection cage at the Bank when the loans were made. This notice, Appellant contends, is chargeable to the Bank under the doctrine of *respondeat superior*. Apparently Appellant contends that the mere presence of the drafts in the branch placed the Bank on notice that the title documents were obtained by the Bankrupt from the Appellant by means of false representations and that the presence of the unpaid drafts placed the Bank on notice of the position of the Appellant as an unpaid seller claiming retention of title.

There are several answers to these contentions. In the first place, as has been demonstrated above, the unpaid drafts themselves disclose no intent on the part of the seller to retain title until the drafts were paid nor do the drafts themselves nor the fact that the title documents did not accompany the drafts indicate any fraud on the part of the Bankrupt. Even assuming for the purposes of argument that the Bank is chargeable with knowledge of the contents of the drafts, the Bank would still be justified in concluding that there was no fraud involved and that the Appellant had intended title to pass unconditionally to the Bankrupt. The trial court so found [Finding 15, R. 67].

The Appellant contends that the presence of the drafts without the title documents together with the fact that the title documents were in the possession of the Bankrupt constituted a set of suspicious circumstances indicating that the title documents might have been stolen by the Bankrupt and that the Bank should have inquired as to how he got title. In answer to this contention we again point out that the Appellant voluntarily relinquished the title documents to the Bankrupt for the specific purpose of enabling the Bankrupt to borrow money on the security thereof. It is a fair conclusion that if inquiry had been made, this fact would have been made known to the Bank.

We do not believe that it is sound to argue that merely because the drafts were designed to be accompanied by title documents it must be concluded that any documents not accompanying the drafts were unlawfully obtained. The parties could and did in this case choose not to place the title documents in the draft envelopes. It is also to be noted that assuming the Bank is chargeable with knowledge of the unpaid drafts, the Bank also had before it knowledge of the fact that some of the drafts had been previously dishonored, returned unpaid to the Appellant's bank in Mexico and resubmitted for collection, all prior to the delivery to the Appellant of the April drafts. All of these facts taken together, it seems to us, would lead a person in the Bank's position to conclude that (a) the Appellant intended to pass title to the vehicles unconditionally to the bankrupt whether or not the drafts were paid, and (b) the Appellant intended the Bank to rely upon the possession of the title documents by the bankrupt.

If the Appellant had desired to protect itself by compelling payment of the drafts before the passage of title to

the bankrupt, the machinery for such protection was readily available: to-wit, the attachment of the title documents to the drafts or the enclosure thereof in the draft envelopes. If the Appellant had chosen this procedure, the transaction would have been a documentary collection and the duty of the Bank would have been clear to retain the title documents for the benefit of the Appellant until the drafts were paid. The Appellant for its own reasons saw fit not to avail itself of this protection, and it seems to us that the Appellant cannot now argue that it was the duty of the Bank to afford it this protection without any instruction, advice or indication that it desired such protection. Everything that the Appellant did, on the contrary, indicated an intention to trust the Bankrupt with title to the vehicles, to enable the Bankrupt to place a lien upon the vehicles and to pay the drafts at the Bankrupt's pleasure. The Appellant seeks by this action to put strings on the title documents at the expense of the Bank now that hindsight indicates that the Appellant's confidence in the Bankrupt was misplaced.

If the Appellant had actually intended the sales to be cash sales, it would have rescinded the transactions or sought to recover possession of the vehicles shortly after March 18, the date the March 6th drafts [Exs. A and B] were returned unpaid for the first time [Finding 12, R. 65]. Instead of doing this, however, the Appellant saw fit to resubmit the drafts for collection a second time and while the first group of drafts was still unpaid Appellant delivered three more automobiles to the bankrupt and took additional drafts as a means of collecting the purchase price. It is submitted that these acts on the part of Appellant are not consistent with the theory now advanced by Counsel that Appellant intended to part with

title only if the drafts were paid immediately upon presentment in the same manner as a check is paid.

There is no basis for Counsel's contention (Br. 30) that the Bank should have informed the Appellant that the Bankrupt was borrowing money on the cars. The Bank did everything that it was supposed to do in these circumstances: it returned the drafts dishonored to the source from whence it received them, the Appellant's Mexican bank. When it is considered that the Appellant's general manager admitted that the flooring of the cars was contemplated by him at the time he delivered them to the Bankrupt, the argument that the Bank should have informed the Appellant of the borrowings seems hardly tenable. [See Finding 10, R. 64.]

C. The Conversations Between the Bankrupt and the Appellant Were Irrelevant as to the Bank, and Were Properly Stricken.

Counsel apparently argues (Br. 28-30) that the testimony consisting of conversations between the Bankrupt and the Appellant outside the presence of any Bank representative were improperly stricken and that if these conversations had not been stricken there would be evidence in the record controverting Finding 15 [R. 67]. Finding 15 is based upon the possession of the vehicles and indicia of ownership in the hands of the Bankrupt and upon the absence in the record of any properly admissible testimony tending to show that any facts indicating the intent of the Appellant and the Bankrupt to make cash sales were brought to the attention of the Bank.

In this connection the Referee and the District Judge correctly concluded that in view of the fact that these

conversations were not heard by any representative of the Bank and their substance was never communicated to the Bank, the conversations were irrelevant and could not in any manner bind the Bank. The conversations were *res inter alios acta.* 2 Jones, Commentaries on Evidence (2d Ed.), Sec. 611, pp. 1131-1134; *Chapman v. Metropolitan Life Ins. Co.,* 172 So. Car. 250, 173 S. E. 801, 807; *Nicholas v. Granite State Fire,* 125 W. Va. 349, 24 S. E. 2d 280, 284; *Carroll v. Rye Township,* 13 N. D. 458, 101 N. W. 894, 897.

II.

The Fact That, as Between Themselves, the Appellant and the Bankrupt May Have Intended to Make Sales of the Vehicles for Cash Does Not Give the Appellant a Right to Retain Title as Against the Bank. The Cases Cited by the Appellant Are Distinguishable.

The Appellant argues in Point 1 of his brief and in Appendix 1 that the drafts, Exhibits A to E, inclusive, must be construed to compel the conclusion that a cash sale transaction was intended.

We do not quarrel with the rules set forth in the cases cited on page 18 of the Appellant's brief and quoted in Appendix 1. We do not believe, however, that these cases are applicable to the fact situation here presented. The *rationale* of the cases cited by the Appellant is that where the parties have intended to make a cash sale, the mere fact that the seller takes the buyer's check in payment does not prevent him from being in the position of an unpaid seller in a cash sale transaction in event the check is dishonored. The reason for this rule is obvious. It is assumed in the normal cash sale that the drawer of

a check on a bank has in the bank sufficient funds to meet the obligation, and the seller of the goods should be entitled to rely upon the issuance of such a check and should not be deprived of his title to the goods simply because he has taken a check as conditional payment.

The rule of the cases cited by the Appellant does not prevent the application of the doctrine of estoppel where the elements of estoppel are present. Indeed in *Clark v. Hamilton Diamond Company,* 209 Cal. 1, cited App. Op. Br. Appendix 1, p. 11, the Supreme Court took great care to point out that no indicia of ownership to the diamond ring was delivered by the plaintiff to the purchaser. The Court said (p. 3):

> As between the original seller and third parties, the relation is to be determined by what the vendor has done or has not done. In this case the plaintiff gave to Justice, the original purchaser, no indicia of title other than the possession of the property. * * * There was no other indicia of ownership other than mere possession. That was not enough. There must be some act or conduct on the part of the real owner whereby the party selling was clothed with apparent ownership or authority to sell and which the real owner will not be heard to deny or question to the prejudice of third persons dealing on the faith of such appearances.

In the instant case the Bank is in the position of a third party which has relied upon the acts and conduct of a seller who clothed the Bankrupt with apparent ownership and authority to encumber the property. Indeed the Appellant gave the Bankrupt actual authority to encumber the property [Finding 10, R. 64].

Several courts have applied the doctrine of estoppel in cases where a check has been given in payment of the purchase price and later dishonored upon presentment. *Sullivan Co. v. Wells,* 89 F. Supp. 317 (D. Neb. 1950); *J. L. McClure Motor Co. v. McClain,* 34 Ala. App. 614, 42 So. 2d 266 (1949); *Seward v. Evrard,* 240 Mo. App. 893, 222 S. W. 2d 509 (1949); *Kent v. Wright,* 198 Okla. 103, 175 P. 2d 802 (1946).

It is further to be noted that all of the cases cited by Counsel involve the giving of a negotiable check or draft for the price, and that the Uniform Sales Act in codifying this rule specifies that it is applicable "when a bill of exchange or other negotiable instrument has been received as conditional payment" (Civil Code, Sec. 1772(b)). The drafts involved in the instant case were clearly non-negotiable because they were not made payable to order or to bearer as required by Section 3082(4) of the Civil Code and because the drafts clearly specified that they were to be forwarded for collection only. This indicates a clear intent on the part of the drawer of the drafts that they were not to be negotiated for immediate credit. The doctrine of the cases cited by the Appellant in Appendix 1 is based at least in part upon a public policy in favor of inducing sellers to accept negotiable instruments as conditional payment. There is no apparent necessity for extending this doctrine to cover non-negotiable drafts.

In any event, the cases relied upon by Appellant are readily distinguishable:

In *De Vries v. Sig Ellingson & Co.,* 100 F. Supp. 781 (D. Minn. 1951) (App. Op. Br. Appendix 1, pp. 1-2), the court held that mere possession of the goods was not enough to create an estoppel. In that case a worthless

check was given as conditional payment for goods. No indicia of title passed from the seller to the buyer.

In *Engstrum v. Benzel,* 191 F. 2d 689 (9 Cir., 1951), and *Engstrum v. Wylie,* 191 F. 2d 684 (9 Cir., 1951) (App. Op. Br. Appendix 1, pp. 2-3), this Court recognized that a check may be taken as conditional payment in a cash sale transaction and that if the check is dishonored the seller may retake the goods. In the *Wiley* case, *supra,* at 191 F. 2d 688, this Court expressly recognized the applicability of the doctrine of estoppel in cash sale transactions where the rights of third parties are involved.

In *Johnson v. Robinson,* 203 F. 2d 135 (App. Op. Br. Appendix 1, p. 4), the court held that a cash sale was intended and that the taking of the check did not amount to an extension of credit. No indicia of ownership passed and the court held that the seller may reclaim the property from one who "does not have any better equitable claim to it than the vendee." It is the position of the Bank in the instant case that it has a better equitable claim to the vehicles and their proceeds than either the Bankrupt or the Appellant.

Towey v. Esser, 133 Cal. App. 669 (App. Op. Br. Appendix 1, pp. 6-9), was a controversy between an attaching creditor and an unpaid seller. The court held that the attaching creditor of the buyer had no better right to the proceeds of the cattle than the buyer had. While it is true in that case that a bill of sale for the cattle was given, the attaching creditor was not a bona fide purchaser who relied upon the bill of sale. In the instant case the Bank was a bona fide encumbrancer which relied upon the product of the Mexican registrations and

bills of sale which were used by the bankrupt to obtain California ownership certificates on the vehicles involved [Finding 11, R. 64-65].

South San Francisco Packing and Provision Company v. Jacobsen, 183 Cal. 131 (App. Op. Br. Appendix 1, pp. 4-6), also was a controversy between an attaching creditor of the buyer and the unpaid seller. In that case a worthless check was given in payment for hogs and the seller gave no indicia of ownership. There was thus no question of estoppel raised.

Peerless Motor Co. v. Sterling Finance Corp., 109 Cal. 621 (App. Op. Br. Appendix 1, pp. 9-10), was a worthless check case involving the sale of an automobile. In that case neither possession of the vehicle nor any indicia of title was delivered by the seller to the buyer. The court expressly found that there was nothing in the conduct of the seller which estopped it from asserting title to the vehicle, thus tacitly recognizing that in a proper case the doctrine of estoppel would be applied.

In summary we submit that none of the cases cited by the Appellant impair the applicability of the doctrine of estoppel in the instant case. The cases cited in Section 1 of Appellant's Opening Brief and in Section I A of this Brief adequately demonstrate that where a seller of goods conducts himself as the Appellant here has done, he is estopped to contend as against third parties that title was retained, even though he may have intended to retain title.

III.

The Promises Allegedly Made by the Bankrupt to the Appellant That the Drafts Would Be Paid Upon Presentment and the Representation Allegedly Made by the Bankrupt to the Appellant That the March Drafts Had Been Taken Care of Did Not Put the Bank Upon Notice of Any Fraud, and in Any Event Such Promises and Representations Did Not Bind the Bank.

Appellant argues in Point 2 of his brief, pp. 19-20, and in Appendix 2, pp. 14-16, that a representation allegedly made by the bankrupt to the Appellant on or about April 2, 1953, to the effect that the March drafts had been taken care of constituted fraud and that the April vehicles were therefore stolen by the bankrupt from the Appellant. Counsel concludes from this representation (which was, of course, stricken as irrelevant on the Bank's motion) that the Bank should have inquired as to the manner in which the Bankrupt obtained the California ownership certificates. In the first place the issue dates on the California ownership certificates presented to the Bank [Exhibits 4, 5, 6 and 7] show that in each instance they were issued at a date subsequent to the date of the applicable draft. If investigation had been made by the Bank, the Bank would have been justified in concluding from this fact alone that it was never intended that the title documents be included with the drafts or held until the drafts were paid.

Carrying Counsel's theory (Br. p. 20) to its logical conclusion would require that the Bank not rely in any instance upon the possession by anyone of the official ownership certificate issued pursuant to Division 3, Chapters 1, 2 and 3 of the Vehicle Code of California. The

Appellant would have this Court impose upon the Bank in each instance a duty to inquire behind the ownership certificate and require the presentation of evidence that the party in possession of the ownership certificate had fully paid for the vehicle.

We submit the Appellant's Point 2 is entirely without merit for the further reason, previously discussed that the drafts themselves [Exhibits A to E inclusive] contain no indication of any intent on the part of the seller to retain title to the vehicles until the drafts had been paid.

The Appellant cites and relies upon *Nathe v. Fred W. Gray Co.,* 75 Cal. App. 2d 682 (1946). In that case the court held that the encumbrancer was not a bona fide encumbrancer because it had accepted a forgery of the true owner's name upon the encumbrance documents and because the bill of sale had been stolen from the room of the true owner. The court pointed out in the *Nathe* case that the true owner had done nothing to give rise to an estoppel. The case is clearly distinguishable from the instant case by reason of the fact that here the Appellant voluntarily delivered the indicia of ownership and possession of the vehicles to the bankrupt and authorized the bankrupt to encumber the vehicles [Findings 10, 11, R. 64-65].

Counsel contends in Point 4 of his brief [R. 31-32] that the Court should have permitted the witness Resnick to answer the question as to whether or not he told the Appellant that the March drafts had been taken care of. It is submitted that the Referee's ruling in excluding this testimony as to the Bank was correct under the authorities cited in Section I, C of this brief. In any event the same matter was covered by the testimony of Mr. Luken.

Since the testimony of Mr. Luken on this point is uncontroverted we cannot see how the Appellant was prejudiced by the rejection of the testimony of Mr. Resnick. Mr. Luken testified [R. 147] that "I asked him how he was with the drafts. He said that everything has been taken care of." The testimony of Mr. Resnick, the exclusion of which the Appellant now contends was error, was therefore cumulative, whether or not is was material or relevant.

IV.

The Challenged Findings Are Adequately Supported by the Evidence.

The Appellant argues (Br. 33-38) that there is no evidence to support Findings 10, 11, 14, 15 and 17. Counsel construes the motion to strike as including all of the testimony of Mr. Resnick beginning at R. 127, all of the testimony of Mr. Luken beginning at R. 137, and all of the testimony of Mr. Rodriguez beginning at R. 147. It is clear from Conclusion of Law No. 6 [R. 70] and from the Referee's order [R. 171] that the only matters stricken were the conversations between the representative of the bankrupt and the representative of the appellant. The remainder of the testimony of these witnesses remains in the record.

Finding 10 [R. 64] is supported by the testimony appearing at R. 144. Finding 11 is supported by the testimony appearing at R. 132-133, 144 and R. 111-116. Finding 14 is supported by R. 133-134, 144. Finding 15 is supported by the Exhibits A to E inclusive and 4 to 7 and Finding 7 is supported by testimony at R. 141, 144, 132-133, 145, 135; Exs. A to E, inclusive, and R. 116. None of the testimony referred to and relied upon in

support of these findings was stricken testimony since the order granting the motion to strike was confined to the conversations.

Conclusion.

The significant point in this case was the delivery of possession of the cars and the title documents by the Appellant to the Bankrupt with the intent that the Bankrupt should "floor" the vehicles with the Bank, thus placing a first lien in favor of the Bank upon them. This delivery of title documents, whether characterized as intentional or negligent, enabled the Bankrupt to obtain California ownership certificates showing the Bankrupt as owner of the vehicles and enabled him to borrow money on the strength of the vehicles from the Bank. In lending, the Bank relied upon the Bankrupt's possession of the California ownership certificates. The presence of the unpaid drafts in the collection department of the Bank was not a sufficient circumstance to charge the Bank with notice of any defect in the bankrupt's title to the vehicles. The case is therefore controlled by the authorities cited in Section I of this brief, interpreting and applying Section 3543 of the California Civil Code to a case of this type, and placing the responsibility upon the Appellant. The decisions of the Referee and of the District Judge were clearly correct and the order appealed from should be affirmed.

Respectfully submitted,

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